No. 15873

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES AS APPELLANT AND APPENDIX

GEORGE COCHRAN DOUB,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
MORTON HOLLANDER,
HERSHEL SHANKS,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 15873

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES AS APPELLANT AND APPENDIX

This suit was filed by the United States to recover civil damages from defendants, who had fraudulently obtained certain Government surplus property in violation of Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. App. (1946 ed.) 1611 *et seq., infra,* pp. 6–7. On October 16, 1957, the United States District Court for the Southern District of California awarded judgment in favor of the United

States for $8,000.00 (R. 119–120). The Government here appeals from that judgment on the ground that it is entitled to a damage award in the amount of $159,025.32.[1]

The jurisdiction of the district court rested on 28 U. S. C. 1345 and Section 26 (c) of the Surplus Property Act of 1944, 58 Stat. 780, 50 U. S. C. App. (1946 ed.) 1635 (c). The Government's notice of appeal was filed on September 13, 1957 (R. 121). The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

The Government filed its initial complaint on December 31, 1954 to recover civil damages for violation of the Surplus Property Act of 1944, *infra,* pp. 6–7 (R. 3–23). This complaint contained five causes of action. Each of these causes of action alleged that E. B. Hougham, individually and doing business as Baker's Motor Market, conspired with a particular named veteran to violate the Act. The substance of the charge was that Hougham used each of the veterans as a front man to purchase for him, with the use of the veteran's priority certificate, surplus-property vehicles to which Hougham was not otherwise entitled. The veterans in the first three causes of action were defendants Owen Dailey, William E. Schwartze and Harlan L. McFarland, respectively. The fourth and

[1] Defendants have also filed an appeal contending that the Government's action is barred by a statute of limitations and that there is insufficient evidence to support the district court's finding that they were guilty of fraud (R. 450). We will meet these contentions in a separate answering brief. Our present brief is, of course, limited to the issue presented by our appeal.

fifth causes of action, involving other veterans, were subsequently dropped.

Paragraph VIII of the first cause of action alleges that the defendants named therein (Hougham and Dailey) are liable to the United States in the sum of $2,000.00 for each violation of the statute plus double the amount of actual damages sustained by the Government (R. 9–10). This allegation is incorporated by reference in Paragraph I of the other two relevant causes of action (R. 10, 13). This measure of damages is expressly provided for by Section 26 (b) (1) of the Surplus Property Act, *infra,* p. 6. Based on its belief that the purchase of each vehicle was a separate violation of the Act, the Government sought damages totalling $300,000.00 from these three veterans and Mr. Hougham in view of their fraudulent purchase of 150 vehicles (R. 22–23).

Thereafter the Government moved for leave to file a first amended complaint, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure (R. 23–24). Attached to this motion was the proposed first amended complaint (R. 25–43). The proposed first amended complaint was substantially identical with the Government's initial complaint, except that counts four and five of the initial complaint were dropped and the measure of damages which the Government sought was altered. Paragraph VIII of count one of the proposed first amended complaint alleged damages—as provided for in Section 26 (b) (2) of the Act—in the amount of twice the consideration paid to the United States for the fraudulently obtained prop-

erty,[2] rather than the measure of damages provided by Section 26 (b) (1) of the Act ($2,000.00 plus double damages for each violation of the Act). This allegation in count one of the proposed first amended complaint was incorporated by reference in counts two and three by Paragraph I of those counts (R. 32, 36). This complaint alleged that the defendants paid $79,512.66 for their fraudulently obtained property. Accordingly, under Section 26 (b) (2), of the Act, the Government was entitled to $159,025.32, substantially less than the $300,000.00 it sought in its original complaint. Nevertheless, the court ruled that the theory of damages could not be amended because, the court reasoned, the Government had made an irrevocable election by filing its initial complaint (R. 116).[3] Accordingly, the Government withdrew the proposed first amended complaint and filed a motion for leave to file a second amended complaint (R. 48). This complaint, subsequently filed, sought damages in the amount of $2,000.00 for each violation of the Act, proceeding under 26 (b) (1) of the Act, as did the initial complaint.

The defendants answered this second amended com-

[2] The prayer for damages at the end of the proposed first amended complaint repeated the assertion of this measure of damages.

[3] In its pre-trial order, the court noted the Government's contention that it was entitled to double the consideration paid for the fraudulently obtained property (R. 101). After stating its ruling that an irrevocable election of alternative statutory measures of damage had been made by the filing of the initial complaint, the court noted that "[p]laintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal" (R. 101).

plaint (R. 74–88), and after a full trial on the merits, the district court, per Jertberg, J., ruled that "these [three veterans] were largely messenger boys in acquiring the surplus vehicles that Mr. Hougham felt that he could use in his business" (R. 443). "As far as any enterprise of these three men it was purely synthetic" (R. 443). In its formal findings of fact, the court found that each of the three veterans used their veteran's priority certificate to obtain surplus property, not for their own businesses, but for Mr. Hougham (R. 105–119). In computing the damages to which the Government was entitled, the court proceeded under 26 (b) (1) of the Act ($2,000.00 for each violation plus double the amount of actual damages sustained). The court rejected the Government's contention that the purchase of each vehicle constituted a separate violation of the Act (R. 444–447). Instead it ruled that each fraudulent application for a veteran's priority certificate constituted a violation of the Act (R. 446–447). On this basis, the Government had proved only four violations since only four applications were involved.[4] Accordingly, the Government's recovery was limited to $8,000.00, despite the fact that defendants' purchases amounted to $79,-

[4] Owen Dailey and William E. Schwartze each filed a single application and made their purchases pursuant to a single priority certificate issued in reliance on these applications (R. 119–120). Harlan L. McFarland filed two applications on the basis of which he received two priority certificates (R. 120). Accordingly, judgment against Dailey and Schwartze was entered in the amount of $2,000.00 each, and judgment against McFarland was entered in the amount of $4,000.00 (R. 120). E. B. Hougham was made jointly and severally liable with each of the veterans (R. 119–120).

512.66 (R. 107, 110, 112–113, 55–73). From this limitation of liability based on election of remedies doctrine, the Government appeals.

STATUTE AND RULES INVOLVED

1. Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. App. (1946 ed.) 1635,[5] now appearing at 40 U. S. C. 489, provides in pertinent part as follows:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

[5] The Surplus Property Act of 1944 was repealed by the Act of June 30, 1949, 63 Stat. 399. However, 1 U. S. C. 109 provides that a repealed act shall be treated as remaining in force with respect to any penalty, forfeiture, or liability incurred prior to the repeal. See *United States* v. *Weaver*, 107 F. Supp. 963 (D. C. N. D. Ala.), reversed on other grounds, 207 F. 2d 79 (C. A. 5).

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

2. Rule 2 of the Federal Rules of Civil Procedure provides as follows:

There shall be one form of action to be known as "civil action".

3. Rule 8 (e) of the Federal Rules of Civil Procedure provides as follows:

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

469908—58——2

4. Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (a) *Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.
>
> (b) *Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the object-

ing party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.*—Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

SPECIFICATION OF ERRORS

1. The District Court erred in holding that the United States irrevocably elected its choice of statutory remedies for fraud by filing its original complaint.

2. The District Court erred in refusing to allow the Government to amend its initial complaint with respect to damages.

ARGUMENT

The District Court erred in holding that the Government irrevocably elected its choice of statutory remedies for fraud by filing its initial complaint and that it was thereafter foreclosed from amending its complaint with respect to damages

Introduction and summary

The Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. App. (1946 ed.), 1611 *et seq.* was enacted to provide for the disposal of large quantities of material owned by the Government at the conclusion of World War II. See *Rex Trailer Co., Inc.* v.

United States, 350 U. S. 148. Section 26 of that Act, which is involved here, provides the Government with civil remedies for fraudulent acts in connection with the disposal of this property.[6] That section it is appropriate to note, is of continuing importance, since its pertinent provisions have been reenacted *in haec verba* in the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, 392, 40 U. S. C. 471, 489, which governs the present disposal of almost all government property, including military.

To provide, in the language of the Committee Report, for the "honest administration of the Act"[7] the United States is given, in addition to criminal sanctions, three civil remedies against those who defraud their Government in connection with the disposal of surplus property. The civil remedies are in the nature of liquidated damages (see *Rex Trailer Co., Inc.* v. *United States,* 350 U. S. 148, 150–152; *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 548–549), and are available against "every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing". Section 26 (b) of the Act, 50 U. S. C. App. (1946 ed.) 1635.

[6] See preceding footnote, p. 6.

[7] S. Rept. 1057, 78th Cong., 2d Sess., p. 14.

Section 26 (b) provides that those who thus defraud their Government:

> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or
>
> (3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

In addition, Section 26 (d) specifically preserves any other civil remedies which may otherwise be available to the Government.

The court below has held that by alleging damages in its initial complaint in the amount of $2,000 for each violation of the Act, plus double the amount of actual damages, the Government closed the door on the other remedies which the statute provides. To reach this result the district court relied on an overly technical and outmoded application of the doctrine of election of remedies. In so doing, the court permitted those who, by its own finding, have defrauded their Government to escape the full measure of damages stipulated by the Act. If this holding is law, it means that those who have cheated their Government can

avoid the full effect of the statute because of a pleader's error.

That the doctrine of election of remedies is inapplicable to the situation in the case at bar is clear from the holding in *Bernstein* v. *United States,* Nos. 5704 and 5705, decided by the Court of Appeals for the Tenth Circuit on May 23, 1958. In an almost identical surplus property fraud case, that Court held that the application of the election doctrine to the mere filing of a complaint contravened both the letter and the spirit of the Federal Rules of Civil Procedure. Accordingly, an amendment to the prayer for damages was held to be valid against the affirmative defense of election of remedies.

Moreover, the doctrine of election of remedies has no application to statutory measures of damage because these statutory remedies are not "inconsistent", as that term is used in election of remedies cases. The statutory remedies, unknown to the common law, are simply alternatives available to the Government, and the same factual allegations and proof will support any of the remedies. For this reason too, the doctrine has no application to the case at bar.

To apply the election doctrine so as to foreclose an amendment to a complaint in these circumstances clearly runs counter to the oft-quoted admonition of the Supreme Court in *Friederichsen* v. *Renard,* 247 U. S. 207, 213:

> At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended * * *

A. *Under the Federal Rules of Civil Procedure the mere filing of a complaint does not amount to an irrevocable election of remedies*

Less than a month ago, the Court of Appeals for the Tenth Circuit—in a case on all fours with the one here—flatly ruled that the doctrine of election of remedies is inapplicable to the mere filing of a complaint by the Government seeking recovery under one of the alternative measures of damages authorized by Section 26 (b) of the Surplus Property Act, *Bernstein* v. *United States,* Nos. 5704 and 5705 (C. A. 10). (This opinion is reproduced in an appendix to this brief for the Court's convenience.) That ruling, we submit, was plainly correct and should be followed here. In the *Bernstein* case, as in the case at bar, the Government designated a particular statutory remedy in its initial complaint. Later attempts to amend the prayer for damages in the initial complaint proved ineffective because of the district court's ruling that the doctrine of election of remedies limited the Government to the theory of the initial complaint.[8] On appeal, the Tenth Circuit reversed:

[8] In the *Bernstein* case, the district court allowed amendments to the complaint, but sustained the defendant's affirmative defense of election of remedies; whereas in the instant case the district court refused to allow an amendment seeking damages under a different section of the statute. The distinction is without a difference. In both cases the district court relied on the doctrine of election of remedies to restrict the Government to a theory of damages under that section of the statute designated in its initial complaint.

If anything, the instant case is even stronger than the *Bernstein* case because in the instant case the damages prayed for in the initial complaint were substantially more ($300,000.00) than the damages sought in the disallowed amended complaint ($79,512.66), while in *Bernstein*, the reverse was true.

Moreover, the district court in the instant case limited the

> Whatever may be said for the common law doctrine of election of remedies before the advent of the Federal Rules of Civil Procedure, we are certain that there is no room for its application under applicable rules of procedure, according to which every pleading is a simple, concise statement of the operative facts on which relief can be granted on any sustainable legal theory "regardless of consistency, and whether based on legal or equitable grounds, or both"; Rule 8 (e) (1) (2) F. R. C. P., and, where the prayer or demand for relief is no part of the claim and the dimensions of the lawsuit are measured by what is proven. * * *
>
> When the complaint is judged in the context of the philosophy of these modern procedural concepts, we are convinced that the election of remedies is inapplicable here. * * *

The basis for the decision is clearly sound. As the Supreme Court recently reiterated, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson,* 355 U. S. 41, 48. The outmoded "theory of the pleadings"

Government not to the construction of Section 26 (b) (1) relied on by the Government in its initial complaint—under which the purchase of each vehicle was a separate violation and under which the Government was thus entitled to $300,000—but to the court's own interpretation of that section whereby the Government was limited to only four forfeitures on the theory that only each fraudulent application was a violation of the Act.

doctrine has been discarded by the Federal Rules. *Conley* v. *Gibson, supra;* II Moore, *Federal Practice,* Sec. 8.14. "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved". *S. E. C.* v. *Timetrust, Inc.,* 28 F. Supp. 34, 41 (D. C. N. D. Calif.). "Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact revelation were performed primarily and inadequately by the pleadings. * * * The new rules, however, restrict the pleadings to the task of general notice-giving," *Hickman* v. *Taylor,* 329 U. S. 495, 500–501.

Under these Rules where the filing of a complaint is simply notice generally of the type of suit involved it is patently erroneous to hold that an irrevocable election of remedies is made by the filing of a complaint without more. Under the notice theory, the complaint simply serves notice on the defendants that the Government is seeking civil damages for violation of the Surplus Property Act in connection with the transactions described in the complaint. To hold otherwise is to re-introduce the theory of the pleadings doctrine through the back door.

As Judge Yankwich said in an early case, "Under the liberal rules of the reformed procedure, a plaintiff is entitled to recover, not on the basis of his allegations of damages or of his theory of damages, but on the basis of the facts as to damages shown in the record". *Nester* v. *Western Union Telegraph Co.,* 25 F. Supp. 478, 481 (D. C. S. D. Calif.). Thus, under the Federal Rules "even the demand for judg-

ment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled". *Gins* v. *Mauser Plumbing Supply Co., Inc.,* 148 F. 2d 974, 976 (C. A. 2). See also *Western Machinery Co.* v. *Consolidated Uranium Mines,* 247 F. 2d 685 (C. A. 10) and Rule 54 (c) F. R. C. P.

Moreover, Rule 15 (a) F. R. C. P. allows an amendment to a pleading as a matter of right before a responsive pleading is served; and thereafter amendments may be made with leave of court, the rule specifically providing that "leave shall be freely given when justice so requires". Rule 15 (a) F. R. C. P. Rule 15 (b) allows amendments to the pleading to conform to the proof even after all evidence is in, and "even after judgment".

The effect of the Federal Rules of Civil Procedure on the doctrine of the election of remedies has often been noted: "[It] is certainly the theory of the Rules," says Moore, "that, unless *prior to the action* a party has made some choice or taken some step which under applicable *substantive* law would be regarded as an election, he may prosecute his claim or defenses without being put to an election." II Moore, *Federal Practice,* Sec. 2.06 [3], p. 362. [Emphasis supplied.] See also *North American Graphite Corp.* v. *Allan,* 184 F. 2d 387 (C. A. D. C.); *Senter* v. *B. F. Goodrich Co.,* 127 F. Supp. 705 (D. C. D. Colo.); 4 *Encyclopedia of Federal Procedure* (3d Ed.) 14.198; I Baron and Holtzoff, *Federal Practice and Procedure,* § 282, p. 534, n. 90. Finally, in *Smith* v. *Pin-*

ner, 68 Ariz. 115, 201 P. 2d 741, the Supreme Court of Arizona applying its state rules, which are identical with the Federal Rules in all respects here material, rejected the same contention that the defendants are making in the instant case based on the doctrine of election of remedies. The Arizona court stated:

> * * * Prior to the adoption of our new rules of civil procedure this contention would constitute a correct statement of the law, but the adoption of the Rule 8 (e), which is Section 21–408 of the Arizona Code Annotated 1939, authorized pleadings which contained inconsistent statements of the pleader's claim. Under such circumstances the theory of election of remedies in this instance is not applicable. * * * (68 Ariz. at 119–120, 201 P. 2d at 743).

* * * * *

Moreover, even before the promulgation of the Federal Rules, the Supreme Court, in an *a foriori* case, ruled that the filing of a complaint does not amount to such an election of remedies as to foreclose an amendment changing the theory of damages, *Friederichsen* v. *Renard,* 247 U. S. 207. In that case a suit in equity was filed by the purchaser of land to rescind for fraud. A master, to whom the case was referred, found that the suitor was not entitled to the equitable relief he sought because he had cut some timber on the land, thus making a return to the status quo impossible. The court thereupon ordered the case transferred to the law docket and allowed an

amendment of the prayer after the statute of limitations had run, so that the suitor now sought, instead of rescission, damages. The defendant argued that "in disaffirming the contract by his suit in equity, the petitioner elected to pursue one of two inconsistent remedies open to him, until the period of the statute of limitations had expired, and that he therefore cannot escape that bar when afterwards, by amendment of his pleadings, he seeks to affirm the contract and recover damages", 247 U. S. at 211. This is precisely the argument presented by the defendants here, except that in the instant case the defendants' position is considerably weaker in that no statute of limitations is applicable to this suit. In the *Renard* case, the Supreme Court ruled that the amendment to the prayer for damages was proper, and stated:

> At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended * * * (247 U. S. at 213).

In reaching this conclusion the court noted the effect of the liberal amendment procedures provided for by the then applicable rules.

> In view of the New Equity Rules of 1912, especially Rule 22, and of the Act of Congress of March 3, 1915, 38 Stat. 956, it cannot be said that the power of courts of equity to amend pleadings, or to permit them to be amended, to accomplish the ends of justice, has been curtailed since the *Hardin Case* was decided in 1884. (247 U. S. at 212).

In the case referred to in the quotation, *Hardin* v. *Boyd,* 113 U. S. 756, the court allowed an amendment to a bill in equity to rescind a conveyance for fraud so that it would include an alternative prayer for the purchase money and a lien on the land to the extent of the purchase money. In the *Hardin* case, the motion to amend was not even made until all the evidence was in. Despite this fact, the Supreme Court affirmed the allowance of the amendment, stating:

> It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice (113 U. S. at 761).

Opposed to this array of authority, we have found no federal case in which the filing of a complaint has been held to foreclose the amendment procedure on the ground that the suitor had irrevocably elected his remedy by filing his complaint. It is thus clear both on authority and reason that the mere filing of a complaint does not prevent the Government from amending the complaint to alter the measure of damages it seeks.

B. *The election doctrine is inapplicable to statutory remedies because they are not "inconsistent" as that term is used in election cases*

Aside from the effect of the Federal Rules on the common law doctrine of election of remedies, the doctrine is inapplicable here because the remedies are not inconsistent as that term is used in election cases. The remedies here are simply alternative remedies, not inconsistent, because the application of each de-

pends solely on the identical state of facts, the violation of the statute. Only when the remedies are "inconsistent" is the plaintiff traditionally put to an election.

The so-called "inconsistency of remedies" is not in reality an inconsistency between the remedies themselves, but must be taken to mean that a certain state of facts relied on as the basis of one remedy is inconsistent with, and repugnant to, another state of facts relied on as the basis of another remedy. See e. g., *United States Fidelity and Guaranty Co.* v. *First National Bank,* 172 F. 2d 258, 262, n. 3 (C. A. 5); *Georgia Power Co.* v. *Fountain,* 207 Ga. 361, 366, 61 S. E. 2d 454, 457, certiorari denied, 340 U. S. 934; *Boeing Airplane Co.* v. *Aeronautical Industrial District,* 91 F. Supp. 596, 612 (D. C. W. D. Wash.), aff'd., 188 F. 2d 356 (C. A. 9); *Senter* v. *B. F. Goodrich Co.,* 127 F. Supp. 705, 707–8 (D. C. D. Colo.); "Election of Remedies", 18 Am. Jur. 127, 135. Thus it has been held that "when a certain state of facts under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, though they may not be able to 'stand together'; the enforcement of the one remedy being a satisfaction of the party's claim." *McMahan* v. *McMahon,* 122 S. C. 336, 342, 115 S. E. 293, 295.

This of course is exactly the situation in the case at bar. So long as a violation of the Surplus Property Act is proved, the Government is entitled to any of the alternative three remedies producing the highest award. But the application of any of these statutory

remedies, unknown to the common law, depends on the identical state of facts. The remedies are alternative, not inconsistent; they neither affirm nor disaffirm the transaction. The Government seeks recovery solely on the basis of the violation of a fraud statute; the remedies are predicated on this fraud alone. There is thus no room for the application of the election doctrine to alternative statutory remedies based on identical facts, for these remedies are not, in terms of the doctrine, inconsistent. Consequently the doctrine does not and was not intended to have any application to actions instituted pursuant to the Surplus Property Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with respect to the Government's appeal, with directions to enter judgment against the defendants under Section 26 (b) (2) of the Surplus Property Act.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
MORTON HOLLANDER,
HERSHEL SHANKS,
Attorneys,
Department of Justice, Washington 25, D. C.

APPENDIX

United States Court of Appeals, Tenth Circuit

MAY TERM—1958

Number 5704

ABE BERNSTEIN; MOREY BERNSTEIN; SAM BERNSTEIN; BERNSTEIN BROS. PIPE AND MACHINERY COMPANY, A CORPORATION; MAURICE LEVY; ROSE LEVY; ALBERT BENSIK; AND MODERN SPECIALTY DISTRIBUTORS, A PARTNERSHIP, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Number 5705

UNITED STATES OF AMERICA, CROSS-APPELLANT

v.

ABE BERNSTEIN; MOREY BERNSTEIN; SAM BERNSTEIN; BERNSTEIN BROS. PIPE AND MACHINERY COMPANY, A CORPORATION; MAURICE LEVY; ROSE LEVY; ALBERT BENSIK; AND MODERN SPECIALTY DISTRIBUTORS, A PARTNERSHIP, CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Morrison Shaforth and Charles Rosenbaum for appellants and cross-appellees. Hershel Shanks (Joseph D. Guilfoyle, Donald E. Kelley and Morton Hollander were with him on brief) for cross-appellant and appellee.

Before BRATTON, *Chief Judge* and HUXMAN and MURRAH, *Circuit Judges.*

MURRAH, *Circuit Judge.*

This is an appeal from a civil judgment in a suit by the United States against the appellants and others under the fraud provisions of the Surplus Property Act of 1944, 58 Stat. 765, 780, now Section 209 (b) Federal Property and Administration Act of 1949, 63 Stat. 377, 392.

On the critical dates of the complaint, Section 26 (b) of the 1944 Act provided in substance that every person who engages in any fraudulent scheme or device for the purpose of securing or obtaining, any surplus property of the United States, or who agrees or conspires to do so, shall be liable to the United States for enumerated elective remedies. Jurisdiction of suits under the Act was vested in the United States. Section 26 (c).

The trial court's judgment is based upon an ultimate finding to the effect that in the fall of 1946, the appellants entered into an agreement or conspiracy to defraud the United States in connection with the sale of surplus property of the United States in San Antonio, Texas, by arranging to have war veteran Bensik, an employee of Bernstein Brothers, Inc., apply for a veteran's priority certificate for the purchase of the property in question, ostensibly in his own behalf, for use in his own business, but actually in behalf of and for the benefit of Bernstein Brothers, the purpose and object being to enable the Company to gain possession and control of priority surplus property which, for lack of such priority, it would not be entitled or eligible to obtain.

The underlying facts are that appellant, Bensik, a war veteran doing business as the Modern Specialty Distributors in Pueblo, Colorado, was distributing

grave monuments and other odds and ends, including some reconditioned Stewart-Warner airplane heaters. Appellant, Bernstein Brothers Pipe and Machinery Company, is a large established retail and wholesale dealer in both new and used pipe and machinery in Pueblo. The individual appellants, Bernsteins, are officers and principal owners of the corporation. Appellant, Levy, is a brother-in-law of the corporation president, and General Sales Manager of the company. Bensik started working for the corporation as a salesman in February 1946 for $250.00 per month, but continued to conduct his own small business on the side. On October 20, 1946, Bensik made an application and was certified by the War Assets Administration in Denver, Colorado, for a veteran's priority to purchase $3,000.00 worth of gasoline engine compressors. In his application, he represented that no person other than himself had any proprietary interest in his enterprise in excess of fifty percent of the invested capital or of the gross profits or income thereof; that he was not a broker, and would not broker the surplus property; and was not purchasing the property for the use and benefit of any other enterprise, dealer, broker, merchant or other undisclosed partner or principal.

About the time of his application and certification for the engine compressors, the War Assets Administration offered 928 Herman Nelson airplane heaters and 3341 Stewart-Warner heaters for sale as surplus property in San Antonio, Texas. The property was offered concurrently to all priority groups, including World War veterans, and all levels of trade—all priority groups to bid without price, awards to be made to priority groups at the lowest acceptable price. With notice of this offering, Bensik returned to the War Assets Administration office in Denver on No-

vember 18 or 19, and asked to be recertified for $25,000.00 worth of surplus property, including $20,000.00 worth of "heating and ventilating equipment and machinery—Texas". At the same time, he submitted a letter from a Pueblo bank stating that he was a legitimate dealer and wholesaler of equipment and supplies, and had on deposit with the bank at that time $25,000.00. The bank credit was arranged by appellant Levy, who gave the bank his personal check for $25,000.00 in exchange for a cashier's check for that amount "payable to ourselves" for Bensik's account. Previously, and on October 31, Bernstein Brothers issued its check to Levy for $21,532.00 in payment of his annual salary, less taxes, and Levy apparently financed the transaction with this check and another from Morey Bernstein in the sum of $7,500.00, which was never honored. In connection with his application for the recertification, Bensik submitted a grossly exaggerated financial statement in which he listed $28,000.00 in cash, evidently including the $25,000.00 bank credit represented by the cashier's check. He also certified in connection with this priority application that he had made necessary arrangements to become "an established dealer, jobber or distributor of the kind who customarily take into their possession and have full control for the purpose of reselling property of the kind covered by this order"; that he was not a broker and would not use the property ordered to operate as such; and that he would not engage in "drop sale" in his disposal of the property.

On the basis of these latter representations, Bensik's application was reviewed and he was recertified for the purchase of $20,000.00 worth of the heating and ventilating equipment as a specialty distributor. The original application was stamped "initial stock

for resale". On the next day after the last certification, the $25,000.00 cashier's check was redeposited to Levy's account. He thereupon issued a check to his wife for $20,000.00 and she secured a cashier's check for $20,000.00 "payable to the order of ourselves December 13, 1946". This check was left with the bank for Mr. Bensik. The check to Levy's wife (Bernstein's sister) was a loan to finance the Bensik transaction.

On December 10, Bensik was awarded 600 Herman Nelson heaters at a unit cost of $33.26, or a total sum of $19,956.00. The awards were made on the basis of Bernstein Brothers' nonpriority highest best bid on the whole offering of both the Herman Nelson and Stewart-Warner heaters. Bensik did not go to San Antonio and never examined the heaters before bid or purchase, but appellant, Sam Bernstein, was in San Antonio to bid on the heaters without priority. While there, Bernstein, in a chance conversation with a stranger, later discovered to be a bidding competitor, unwittingly stated that he was working through Mr. Bensik, and inquired whether the stranger "would be interested in purchasing for companies."

After the award of the heaters to Bensik, Sam Bernstein arranged to have them shipped to Bernstein Brothers warehouse in Pueblo and paid the freight. On December 13, 1946, three days after the award of the heaters to Bensik, and before arrival at the Bernstein Brothers warehouse, Rose Levy and Bensik entered into an agreement, by direction of her husband, Maurice Levy, under which Rose Levy agreed to loan Bensik $20,000.00, to be used for the purchase of the 600 heaters. It was agreed that the merchandise would be shipped to Pueblo and stored in the Bernstein warehouse; that

Bensik would proceed to sell the heaters, and after payment of all charges, the proceeds would be applied toward the repayment of the $20,000.00 loan, plus interest. The remainder of the proceeds were to be divided between the parties, forty-five percent to Levy and fifty-five percent to Bensik. It was agreed that all of the proceeds from the sale would be placed in an account known as the Levy-Bensik special account, and that all checks written on such account would be signed by both parties. It was to be distinctly understood that the parties did not intend by their agreement to constitute a partnership, but that the moneys provided to be paid to Levy over and above the loan should merely constitute "interest and return on the said loan." Bensik executed his note to Rose Levy for the $20,000.00 loan. The $20,000.00 cashier's check was thereupon deposited in a new account for the Modern Specialty Distributors, and a check was drawn on this account by Bensik to the Treasurer of the United States in payment of the heaters previously awarded to him.

On December 24, and before arrival of the merchandise in Pueblo, Bensik formally agreed in writing to sell Bernstein Brothers 510 of the heaters at $35.00 each f. o. b. San Antonio, payment to be made as delivery to the Bernstein warehouse was completed. The 510 heaters were duly transferred to Bernstein Brothers for a profit of $1.74 per unit to Levy and Bensik, netting Bensik $488.70. Bernstein Brothers finally sold the 510 heaters for a gross price of $141,154.24, or an average price of $276.00 each. Bensik advertised and eventually sold the remaining 90 heaters for a total profit of $24,000.00, which he divided with Rose Levy in accordance with their contract.

During this time, Bensik purchased from Bernstein Brothers the smaller and less expensive Stewart-

Warner heaters for $125.00 each and resold them for $195.00, and the government emphasizes this disparity in purchase and sale of heaters as evidence of the lack of the bona fides of the whole transaction.

The property in question was awarded to Bensik on the basis of his veteran's priority, for which Bernstein Brothers was ineligible. And, it would undoubtedly be contrary to the spirit and purpose of the Surplus Property Act and actionably wrong, to use Bensik's priority to obtain the property on behalf and for the benefit of Bernstein Brothers. *Rex Trailer Co.* v. *United States,* 350 U. S. 148; *Daniel* v. *United States,* 234 F. 2d 102. Indeed, the gist of the government's claim is that the parties conspired to use Bensik's priority to secure or obtain property for Bernstein Brothers. But appellants earnestly insist that Bensik purchased the property in his own right for his own account; that the subsequent sale of a major portion of it to Bernstein Brothers was not prohibited by any applicable regulation, and was moreover with the knowledge and tacit consent of the War Assets Administration. In other words, the sale was "real and not a sham", hence without fraud or actionable wrongdoing.

No one seems to contend that any applicable regulation forbade the resale of the property to whomsoever Bensik chose. Nor are there any inhibitions against veterans having nonveteran partners in small business enterprises, so long as the veterans are not mere fronts. See *Lee* v. *United States,* 167 F. 2d 137. Nor do we think the representations made for the first certification pertinent to the later certification for the property in question. The first priority was for the veteran's own use, not for resale. The second priority was for property intended for resale and the latter representation superseded the former

and is relevant to the challenged transaction. Therein Bensik certified in effect that he was an established dealer, jobber or distributor, purchasing for resale; that he was not a broker and would not use the property ordered to operate as such—in other words, that he was not acting as the agent of an undisclosed principal who was ineligible to purchase the property on a veteran's priority.

On December 10 (the date of the award to Bensik) Morey Bernstein wrote to the representative of the War Assets Administration in Denver who had certified Bensik's priority, confirming a telephone conversation on November 20 (the day after certification), wherein Bernstein had inquired whether, in the event Bensik's bid was successful, it would be satisfactory for Bensik, the sole owner of Modern Specialty Distributors and a salesman for Bernstein Brothers, to sell Bernstein Brothers a substantial portion of the material purchased, so long as he distributed the remainder among several different buyers. The letter indicated that the representative of the War Assets Administration had replied that in his opinion, there was no objection to this procedure. Three days later, however, the Chief of the Veteran's Division of the War Assets Administration in Denver, replying to Bernstein's letter, stated that "while Bensik is the man who should make the decision regarding the customers he serves", for his protection, and in view of the connection between Bensik and Bernstein Brothers, Bensik should contact the Office of the Regional Counsel for the War Assets Administration. On December 18, Bensik wrote to the Regional Counsel, stating that he was the owner and operator of the Modern Specialty Distributors and a salesman for Bernstein Brothers; that he had sold portable heaters before the San An-

tonio purchase; that he was definitely not acting as a broker; that "Bernstein Brothers merely want to purchase a lot of these heaters from me, but they are extremely careful and wanted to advise you of their action." The Regional Counsel replied in part that "in your case, this office considers it definitely inadvisable for you to sell any part of the material which you purchased to a firm by which you are employed, inasmuch as the transaction would lead to the conclusion that you might merely be acting as agent of that firm in the purchase of surplus property."

While this correspondence did generally advise the War Assets Administration that Bensik planned to sell a major portion of the property to Bernstein Brothers, it also served to advise the appellants that in the circumstances, the transaction smacked of an illegal agency. The first letter of December 10, reflecting the telephone conversation of November 20, left no doubt that from the very inception of the transaction, Bernstein Brothers intended to acquire the major portion of the heaters to be awarded to Bensik under his veteran's priority. In any event, there was nothing in the correspondence to indicate that the appellants relied upon statements contained in the government letters, or that they were deceived or misled in any way. In determining in the last analysis whether Bensik purchased the heaters for his own account as an established dealer for resale, or as a mere broker or agent for Bernstein Brothers, it is significant to note that the gain he realized from the 510 heaters is more like a broker's commission than an established dealer's legitimate profit.

When the evidence is considered in its entirety, we are certainly unable to say that the inferences which the trial court drew from the established facts were

unwarranted, and that its judgment thereon is clearly erroneous.

Invoking the rule in *Jencks* v. *United States,* 353 U. S. 657, appellants complain of the refusal of the trial court to require the government to produce for purposes of impeachment on cross-examination, a report of a government witness made and submitted to the War Assets Administration in connection with his investigation of this case. Witness Poyen did make a report of his investigation in February 1947, and he did refresh his memory from it while testifying as a government witness.

Simple justice and fundamental fairness becoming the sovereign require it to make available to the accused any matter from which its witnesses testify, if such testimony is material and the credibility of the witness in respect thereto is attacked, and proper foundation is laid for impeachment. See *Jencks* v. *United States, supra; Communist Party of United States* v. *Subversive Activities Control Board* (CA D. C. 1/9/58) —— F. 2d ——. The operative facts in this case occurred in 1946; the case was filed in 1951, and tried in 1956. On pre-trial the court denied appellant's motion for the production of the Poyen report under Rule 34 F. R. C. P. Certainly if the report was relevant and not privileged for security reasons, see *United States* v. *Reynolds,* 345 U. S. 1; or as "an attorney's mental impression, conclusions, opinions or legal theories", it was a proper subject for production and inspection under Rule 34 for good cause. See *Hickman* v. *Taylor,* 329 U. S. 495. And, it was undoubtedly subject to production and inspection during trial for impeachment purposes if there was any material testimony to impeach.

On direct examination, witness Poyen testified that he went to Pueblo in 1947 to investigate the case for

the War Assets Administration; that he contacted appellant Bensik at Bernstein Brothers Pipe and Machinery Company; that Bensik told him he had been working for Bernstein Brothers about six months for about $300.00 per month; that Bensik took him to his home in Pueblo and showed him a mock-up of a circular he proposed to distribute throughout the country for the promotion and sale of the heaters. When asked if he recalled the substance of the mock-up for the circular, he answered, "well, having refreshed my memory from my report, I can report on it reasonably accurately." Then he proceeded to state the kind of heaters and the price at which they were to be sold, and other details of the proposed circular. The witness went on to state that in answer to questions, Bensik told him he had sold 510 of the heaters to Bernstein Brothers for $35.00 each under the written contract of December 24, 1946. He further testified that Bensik told him the 90 heaters he proposed to sell were in Bernstein Brothers warehouse; that he had paid for all 600 of the heaters with a check for the full amount on the Modern Specialty Distributors. When asked how he had been financed, he refused to answer or give any information. The witness went on to state that almost immediately after filing his report with the Enforcement Division of the War Assets Administration in Denver, he entered the private practice of law, and that soon thereafter Morey Bernstein called him on the telephone to inquire whether he might be available to act as his attorney in a case, and that he told him he would be unable to do so. When the witness was unable to recall the details of the conversation, government counsel claimed complete surprise, but abandoned further interrogation on that point. He then related a conversation with appellant Levy in the wit-

ness's law office. Levy wanted to know the status of the case, and whether in his investigation he had gotten information he needed. The witness advised him that he had completed his investigation, was in the private practice of law, and could not discuss it with him; and they then discussed his retention as an attorney for Bernstein Brothers, Mr. Levy saying that the fees were immaterial.

At this point, counsel for appellants made demand on the government to produce the report made by the witness to the government. The government objected on the grounds that no proper foundation had been laid, the government having abandoned "that line of questioning * * *." The court took the view that since counsel's objection to the witness's testimony based on the report had in the main been sustained, its production was not required unless cross-examination developed something that would entitle the appellants to see some part of the report. Counsel for appellants sought production of the report for impeachment purposes, and on the further ground that "throughout the examination the attorney for the government was constantly referring to this report."

The decisive fact is that witness Poyen testified to nothing from his report, either on direct or cross-examination, that is disputed now or at the time of trial. His only disputed testimony concerned conversations with Bernstein and Levy, held after he had submitted his report and left the service of the government. In short, there was nothing in his testimony to impeach by reference to the report. We therefore hold that fundamental fairness exemplified in Jencks does not require a reversal of the court's ruling.

Finally, appellants complain of the refusal of the court to permit appellant Levy to testify concerning

advice of counsel on the validity of the Bensik-Levy contract, under which Levy's wife advanced the funds to purchase the heaters. Advice of counsel is invoked to show lack of fraudulent intent. Levy was permitted to testify that his attorney drew the Bensik-Levy contract on information given him by the parties, but the court refused to permit him to testify concerning advice of counsel on the validity of the contract.

Generally, where, as here, fraud is an essential element of the charge, the accused may testify not only that he had no such intent, but he may buttress his statement by proof of conversations with other persons tending to support his statement. *Frank* v. *United States,* 220 F. 2d 559; *Haigler* v. *United States,* 172 F. 2d 986; *Miller* v. *United States,* 120 F. 2d 968. The gravamen of this charge is, however, not the validity of the Bensik-Levy contract. Instead, it is an arrangement between the appellants, whereby Bensik used his veteran's priority to obtain government surplus property in behalf of and for the use and benefit of Bernstein Brothers. There was no testimony or offer of proof indicating that advice of counsel was sought or given concerning the legality of this particular arrangement. And see *McDonald* v. *United States,* 246 F. 2d 727.

CROSS-APPEAL

The United States has appealed from that part of the judgment which puts it to an election of statutory remedies under Section 26 (b) of the Surplus Property Act of 1944, supra. Section 26 (b) provided that any person who shall engage in a scheme or device condemned in this Section "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which

the United States may have sustained by reason thereof, together with the cost of suit; or (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or (3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be." The remedies thus provided are "in addition to all other criminal penalty and civil remedies provided by law." Section 26 (d).

In its original complaint, filed in February 1950, the government prayed for twice the consideration paid the United States for the surplus property, in the amount of $39,912.00. In October, the government moved to amend, alleging that since the filing of the original complaint, it had come to the attention of the Department of Justice that the Bernsteins had made a large profit from the sale of the heaters alleged to have been fraudulently acquired by them; and that if the charges in the complaint were established, the Bernsteins would be liable to the government for the profits, thus greatly enhancing the amount to be recovered. In January 1952, an amended complaint was filed, in which the government sought restoration of the merchandise, or damages in the amount of the proceeds of the sale by the Bernsteins. And, it also reiterated its prayer for twice the consideration paid the government for the merchandise.

After answer to this complaint was filed, and pursuant to leave granted, the government again amended its complaint in April 1954 to pray in the alternative for (1) restoration of the property or the cash proceeds of its sale; (2) twice the consideration paid for the merchandise as originally demanded; and (3) or $2,000 plus twice the amount of damages which the government might have sustained in the sale.

In their answer to the last amended complaint, the appellants moved to compel the government to elect its remedy in accordance with the original complaint, viz, twice the amount of the consideration paid the government for the merchandise. This motion was denied in March 1955, but the government was ordered to elect which of the three remedies it would seek. The government thereupon elected to demand restoration of the property or the proceeds of the sale thereof, less the amount paid the government, together with interest and costs. In an amended answer to the last amended complaint and election filed February 27, 1956, appellants pleaded as a defense the election made in the government's original complaint to demand twice the consideration paid for the merchandise.

The trial court assumed the availability of equitable restitution as an additional remedy "provided by law" under Section 26 (d). And, we have no doubt of it. The court took the view, however, that the government was bound by its original election to affirm the transaction and seek twice the amount of the purchase price of the merchandise. In so doing, it applied the common law doctrine of election of remedies, according to which an aggrieved party with a cognizant choice of two or more remedies for inconsistent rights growing out of the same transaction

must elect one of the remedies to the exclusion of the others. See 18 Am. Jur. Election of Remedies, § 3, p. 129; *Kuhl* v. *Hayes,* 212 F. 2d 37. "The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or judicial administration. It is technical * * *." See Brandeis dissenting in *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 304. It has been consistently criticized as harsh and not a favorite of equity. See *Oil Well Supply Co.* v. *First National Bank of Winfield,* 106 F. 2d 399. It has been applied to suits by the government with caution. *Goldstein* v. *United States,* 277 F. 2d 1.

The trial court recognized that ordinarily an original complaint will not constitute an election precluding a prayer for an inconsistent remedy in an amendment. But the court was nevertheless constrained to enforce the election made in the original complaint because, if the doctrine is "not applicable here, it would be hard to conceive of an instance where it would be" for, said the court, the government "positively stated in its original complaint that it was making and asserting its election," and in so doing, it affirmed the sale to Bensik by seeking liquidated damages as provided in the statute, and having done so, it should not thereafter be permitted to elect to disaffirm the transaction by seeking restitution. The court observed that the government was undoubtedly apprised of the profits the Bernsteins were making on the resale of the heaters, the evidence showing that prior to the filing of the complaint, they had sold sixty-nine percent of the heaters and parts for $96,677.28, and that between the first complaint and the first amendment in 1951, they had sold $10,935.00 more, and thereafter $33,541.96; that the last heater was sold in March, and the final election was made

in the following April. From this the trial court reasoned that the election the government made in April 1955 could very well have been made upon the filing of the first complaint in 1950. The court finally concluded that the appellants "should not be penalized for failing to guess which mode of relief the government would finally adopt, and during the entire period curtail their business and sell slow-moving merchandise accordingly." The court found ample evidence of damage to the appellants upon which the doctrine of election of remedies should rest.

Whatever may be said for the common law doctrine of election of remedies before the advent of the Federal Rules of Civil Procedure, we are certain that there is no room for its application under applicable rules of procedure, according to which every pleading is a simple, concise statement of the operative facts on which relief can be granted on any sustainable legal theory "regardless of consistency, and whether based on legal or equitable grounds, or both"; Rule 8 (e) (1) (2) F. R. C. P., and, where the prayer or demand for relief is no part of the claim and the dimensions of the lawsuit are measured by what is proven. *Western Machinery Co. v. Consolidated Uranium Mines,* 247 F. 2d 685; *Gins v. Mauser Plumbing Supply Co.,* 148 F. 2d 974.

When the complaint is judged in the context of the philosophy of these modern procedural concepts, we are convinced that the election of remedies is inapplicable here. While the court applied the election of remedies with controlling effect, it seemingly weighed the equities as in restitution, and resolved them against the government. In any event, it found equitable grounds for holding the government to its original election. But judging the measure of relief to be granted under equitable restitution, we do not

think the equities weigh in appellants' favor. In its motion to amend, filed in July 1951, the government alleged that it had been apprised of the fact that the Bernsteins had made a large profit on the sale of the heaters, and that if fraud was established, they would be liable for such profits. On this basis, leave was granted to amend to demand restoration or restitution. And, the trial court denied appellants' motion to require the government to stand upon its original demand. When the court required the government to elect one of its available remedies, it finally demanded restoration or restitution. The original demand or election was pleaded as a defense. The record shows that sixty-nine percent of the merchandise was sold prior to the original complaint, and that most of the remainder of the merchandise was sold after notice was given of the government's intention to pursue its remedy in restitution. It cannot be said that the appellants proceeded in reliance upon the government's original election. Moreover, the appellants have no standing in equity to plead that their fraudulent pursuits would have been deterred by the severity of the penalty. We conclude that equitable restitution was available to the government.

The judgment on the appeal is affirmed, and the judgment on the cross-appeal is reversed, with directions to grant restitution.

U. S. GOVERNMENT PRINTING OFFICE: 1958